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NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**CATHY A. CATTERSON
U.S. COURT OF APPEALS**

HILLSIDE DRILLING INC., a corporation,

Plaintiff - Appellant,

v.

CITY OF BERKELEY,

Defendant - Appellee.

No. 02-15767

D.C. No.
CV-99-04646-MMC/EDL

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Argued and Submitted May 12, 2003
San Francisco, California

BEFORE: HUG, GIBSON** and FISHER, Circuit Judges.

Hillside Drilling, Inc. appeals the grant of summary judgment against its claim that the City of Berkeley's Disadvantaged Business Enterprises ("DBE")

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

**The Honorable John R. Gibson, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

program, as applied, imposes an unconstitutional strict quota system.¹ The district court found no basis for municipal liability. The relevant facts are known to the parties and are discussed here only briefly and as necessary. We review the grant of summary judgment de novo, and we affirm. *Oliver v. Keller*, 289 F.3d 623, 626 (9th Cir. 2002).

Hillside contends that Berkeley has an official, though unwritten, policy imposing a quota and that its stated reason for rejecting Hillside's bid is pretext. Berkeley's Bidder-DBE-Information form is confusing and arguably misleading when read without the benefit of the requirements made very explicit in the project specifications. However, this confusion cannot support a reasonable inference that the requirement is pretext. Moreover, no reasonable inference of a quota system may be drawn from the prior contracts awarded, Kenneth Emeziem's deposition testimony, or Berkeley's willingness to waive the requirement in single-bidder situations where doing so is necessary to receive federal funding.²

¹ Hillside does not challenge the Berkeley program as written, which permits a project to be awarded to contractors who do not meet the DBE goal but who present evidence of a good faith effort to do so.

² Additionally, Hillside argues that Berkeley Municipal Code § 13.26.50, involving minority employees, is also unconstitutional and that we should infer an unconstitutional DBE subcontractor program from the unconstitutionality of this other statute. We do not see how the unconstitutionality of one statute reasonably
(continued...)

Hillside next argues Berkeley may be held liable for the conduct of Jack Pajoohandeh because he was delegated final policymaking authority. We disagree. Pajoohandeh's decisions were "constrained by policies not of [his own] making" and were subject to review by others. *Ulrich v. City and County of San Francisco*, 308 F.3d 968, 985-86 (9th Cir. 2002); *Christie v. Iopa*, 176 F.3d 1231, 1236-38 (9th Cir. 1999).

Hillside alternatively argues the City Council ratified Pajoohandeh's unconstitutional act. Hillside presented no evidence that the City Council or any of Pajoohandeh's supervisors were aware of the allegedly unconstitutional basis for Pajoohandeh's decision. *Christie*, 176 F.3d at 1239. Nor has Hillside presented evidence that the City Council, the Director of Public Works or the City Manager merely rubber stamped Pajoohandeh's decision or were otherwise deliberately indifferent. *Id.* at 1240 (citing *Hammond v. County of Madera*, 859 F.2d 797, 803 (9th Cir. 1988)).

Because Hillside cannot establish a basis for municipal liability, summary judgment was properly granted on his section 1983 claim. Moreover, as Hillside acknowledges, its claim under the California Constitution is linked to the survival

²(...continued)
permits an inference that Berkeley acts unconstitutionally generally or in related areas. In any event, Hillside lacks standing to challenge § 13.26.50.

of its section 1983 claim. Thus, summary judgment on the state law claim is appropriate as well.

AFFIRMED.